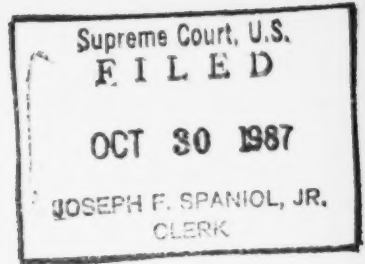


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87-715 (1)



NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

LaVONE TUFFORD d/b/a
B & L PAWNSHOP,

Petitioner,

vs.

BURTON D. DURGAN,

Respondent,

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
FOR THE STATE OF ALASKA

LaVONE TUFFORD
605 Gaffney Road
Fairbanks, Alaska
99701

In Propria Persona

5410



QUESTION PRESENTED

CAN A GRANT OF SUMMARY JUDGEMENT BE SUSTAINED BY AN APPELLATE COURT BY HOLDING THAT SUCH JUDGEMENT WAS GRANTED AS A DISCOVERY SANCTION WHEN NO SUCH FINDING WAS MADE BY THE TRIAL COURT; AND CAN A SUMMARY JUDGEMENT STAND WHEN THERE ARE GENUINE ISSUES OF FACT IN THE CASE AND THE TRIAL COURT RENDERED SUMMARY JUDGEMENT WITHOUT A HEARING?

THE PARTIES

LaVONE TUFFORD is a natural individual and the Petitioner herein; and a citizen and resident of the State of Alaska, representing herself pro se in this petition.

BURTON D. DURGAN is a natural individual and the Respondent herein; and a citizen and resident of the State of Alaska.



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CONSTITUTIONAL PROVISIONS,
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UNITED STATES OF AMERICA)
) ss.
STATE OF ALASKA)

COMES NOW the Petitioner, LaVone
Tufford, being duly sworn, and does here-
by aver that the statements herein are
true; and the attached appendix to be a
true account of the proceedings in the
courts below.

LaVone Tufford

LaVONE TUFFORD - Affiant

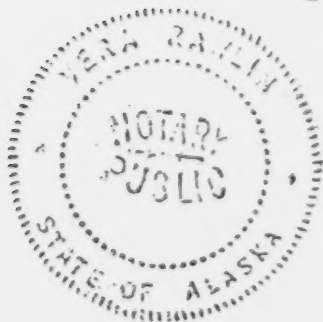
SUBSCRIBED AND SWORN to before me this

26TH day of OCTOBER, 1987.

Wendy L. Rasmussen

NOTARY PUBLIC in and for the
State of Alaska

My Commission expires: Aug. 3, 1990



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

LaVONE TUFFORD d/b/a
B & L PAWNSHOP,

Petitioner,

vs.

BURTON D. DURGAN,

Respondent,

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
FOR THE STATE OF ALASKA

COMES NOW the Petitioner, LaVone Tufford, in her own proper person, and respectfully requests that a Writ of Certiorari issue in the above captioned action to correct the judicial errors and judicial abuses complained of herein. The record in this case will show,

and the Petitioner firmly believes, that the Alaska courts have so far departed from the accepted and usual course of judicial proceedings as to call for the Supreme Court's power of supervision.

OPINIONS BELOW

The Superior Court, as appellate court, affirmed the entry of summary judgement claiming that judgement was entered as a sanction under Civil Rule 37 and was not an abuse of discretion by the trial court; dated the 15th of June, 1987, and filed on the 16th of June, 1987(see Appendix, pages 2-14).

The Petitioner herein then petitioned the Alaska Supreme Court for a hearing seeking a reversal of the Superior Court's holding arguing that summary judgement was entered pursuant to Rule 56 and not Rule 37 and that the trial court made no

findings requisite to support an entry of summary judgement pursuant to Rule 37. On the 5th of August, 1987, the Alaska Supreme Court summarily denied the Petition for Hearing, without opinion; such Order being filed on the 10th of August, 1987(see Appendix, page 1).

JURISDICTION

This court has jurisdiction pursuant to Article III of the Constitution of the United States, Title 28 of the United States Code, Section 1651, and Part V of the Rules of the Supreme Court of the United States, Rules 17 through 23.

The Superior Court for the State of Alaska, Fourth Judicial District, and the Alaska Supreme Court have so far departed from the usual and accepted course of judicial proceedings as to call for the Supreme Court's power of supervision.

This court recognized in Societe Internationale v. Rogers, 357 U.S. 197, at 203,(1958), that important questions as to the proper application of the Federal Rules of Civil Procedure is a proper ground for granting certiorari. In that Alaska has adopted the Federal Rules of Civil Procedure and the rules in question in the instant case are substantially verbatim to the Federal Rules, this court has jurisdiction of the subject matter presented herein.



CONSTITUTIONAL PROVISIONS,
STATUTES, AND RULES

U.S. CONSTITUTION:

Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Fifth Amendment

No person shall be...deprived of life, liberty, or property, without due process of law;

Fourteenth Amendment

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ALASKA CONSTITUTION:

Article I, Section 1

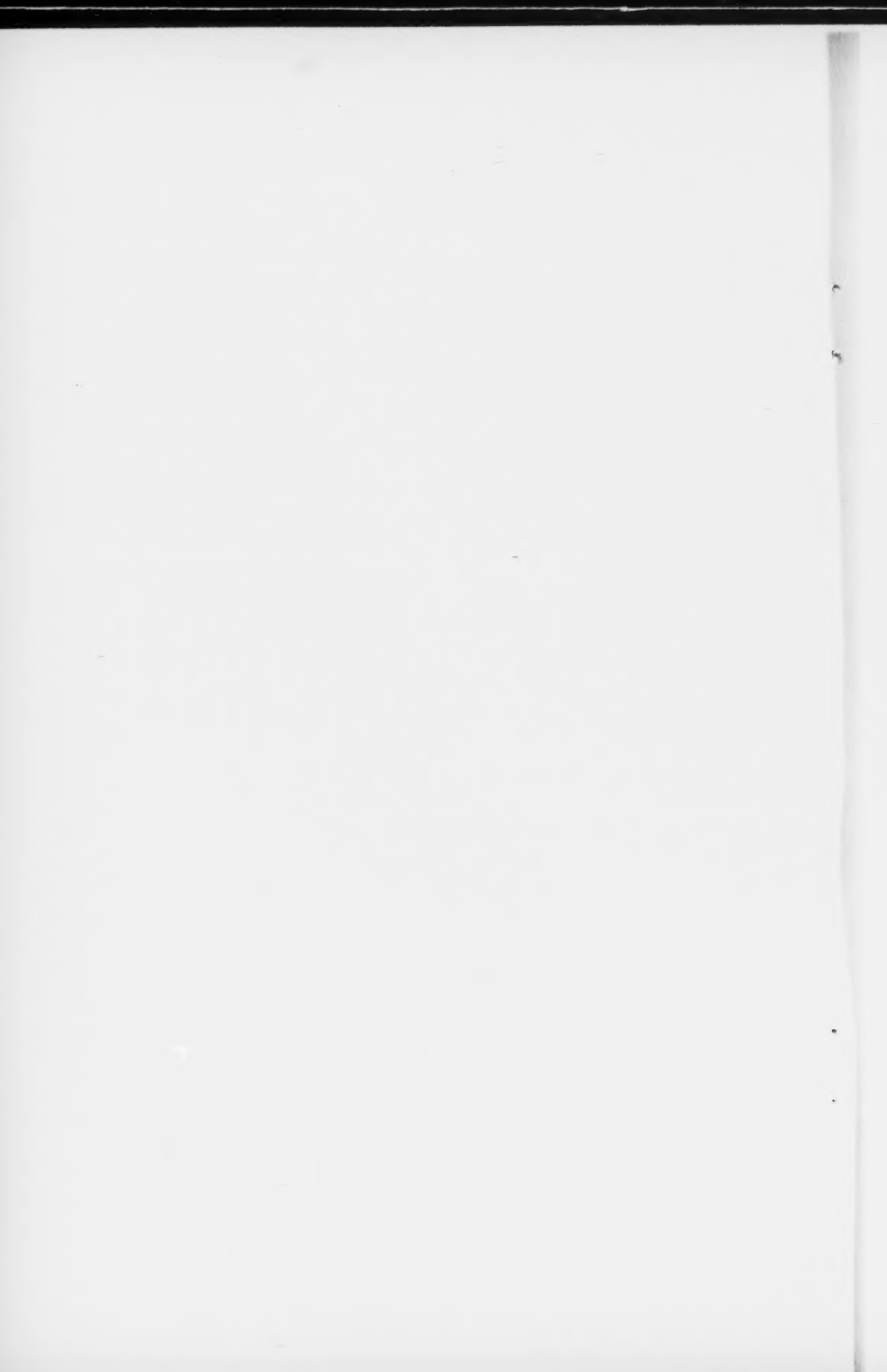
This constitution is dedicated to the principles that all persons have a natural right to life, liberty, and the pursuit of happiness,...; that all persons are equal and entitled to equal rights, opportunities, and protection under the law;

Article I, Section 7

No person shall be deprived of life, liberty, or property, without due process of law.

Article I, Section 16

In civil cases where the amount in controversy exceeds two hundred fifty dollars, the right of trial by jury of twelve is preserved to the same extent



as it existed at common law. The legislature may make provision for a verdict by not less than three-fourths of the jury and, in courts not of record, may provide for a jury of not less than six or more than twelve.

STATUTES:

28 U.S.C. Section 1651

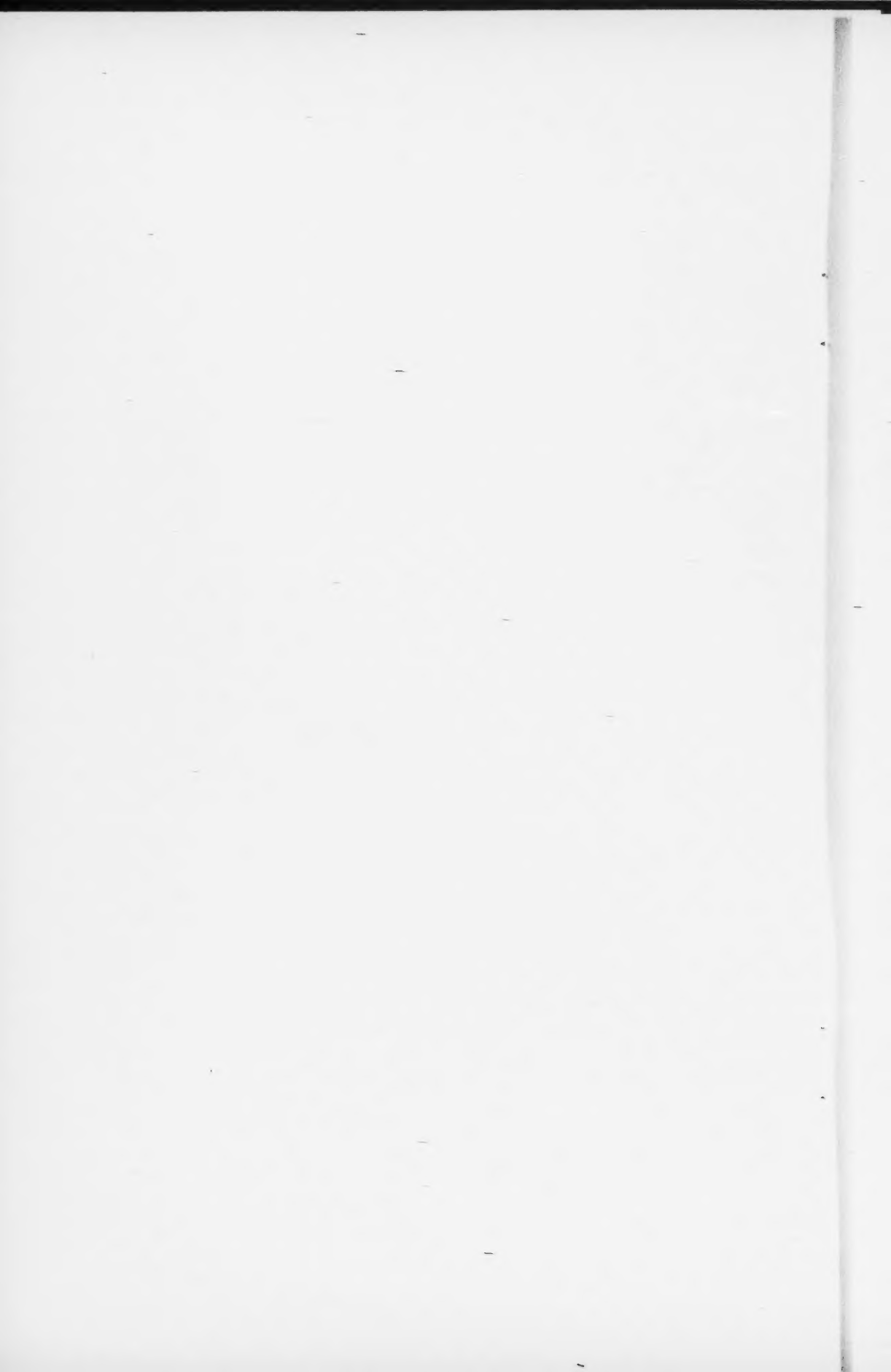
WRITS (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

RULES:

Civil Rule 37

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Production. If a party or an officer, director, or managing agent of a party

or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses,



including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Civil Rule 56

(c) Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgement sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law.



STATEMENT OF THE CASE

The facts of this case are as follows and as found in the record; the Petitioner, hereinafter Tufford, herein charges that the Alaska Appellate Court distorted the facts of this case in which to tailor its opinion(see Appendix, pages 2 - 14).

In 1973, Burton Durgan, the Respondent, (hereinafter Durgan) purchased a Wittnauer wrist watch from Hoitt's Jewelry in Fairbanks, Alaska, and several gold nuggets affixed to it. The record does not disclose that Durgan had his initials engraved on it; only that the initials "R.D." were engraved on the back of the case(R.- pages 11-13 & 94-96).

Durgan testified by affidavit that he had an agreement with a neighbor, a one George Thiele, Jr., that he had authorized Thiele to enter Durgan's residence and

remove and pawn certain items from time to time(R.- page 12). Durgan also testified that at no time did he authorize Thiele to pawn this watch.

On the 23rd of May, 1984, while Durgan was in the B & L Pawnshop, which at that time was owned by Tufford, Durgan saw a watch there and claimed it was his. At that time, Durgan reported his watch as having been stolen to the Alaska State Troopers(R.- page 12).

The following day, Durgan returned to B & L Pawnshop with a Trooper Manumik. Trooper Manumik's report does not contain a description of the watch sufficient to identify it(R.- pages 15-16), only that Trooper Manumik observed the initials "R.D." inside the watch band, not on the back of the case as alleged by Durgan. No mention was made of a serial number in Trooper Manumik's report. At this time,

Tufford placed the watch in the safe at B & L Pawnshop pending possible legal action by Durgan regarding the watch.

On June 4th, 1984, a Trooper MacDonald contacted Hoitt's Jewelry store in Fairbanks, whose records disclosed that Durgan had purchased a watch and had it nuggeted on June 15, 1973. At that time, Trooper MacDonald noted in his report that the serial number of that watch was #1193. (R.- page 17). Actually the # "1193" refers to a ledger entry number in the records of Hoitt's Jewelry Store and is not a serial number on the watch at all(R.-page 62). Tufford discovered this fact and brought it out in her Reply Brief and also the fact that Durgan continued to attempt to identify the watch by way of this number throughout the litigation in the District Court(R.- Reply Brief, pages 5-12).

Further investigation by the Alaska



State Troopers revealed that neighbor of Durgan's, a one Tammy Gitt, had taken a watch to B & L Pawnshop on January 29, 1983. At her deposition, Gitt stated that she had received the watch from George Thiele with instructions to take it to B & L Pawnshop and get him some money for it(R.- Gitt Deposition, page 3); which she did by way of direct sale, not pawn(R.- Gitt Deposition, page 6). Gitt testified that she got the watch from George Thiele and that she did not know if it was Durgan's watch or not(R.- Gitt Deposition, pages 4 & 11).

Trooper MacDonald noted in his report that Durgan declined to prosecute either Thiele or Gitt and that he would pursue the matter civilly(R.- page 17). And that Durgan indicated to him that he would attempt to persuade Gitt to re-purchase the watch and return it to him.

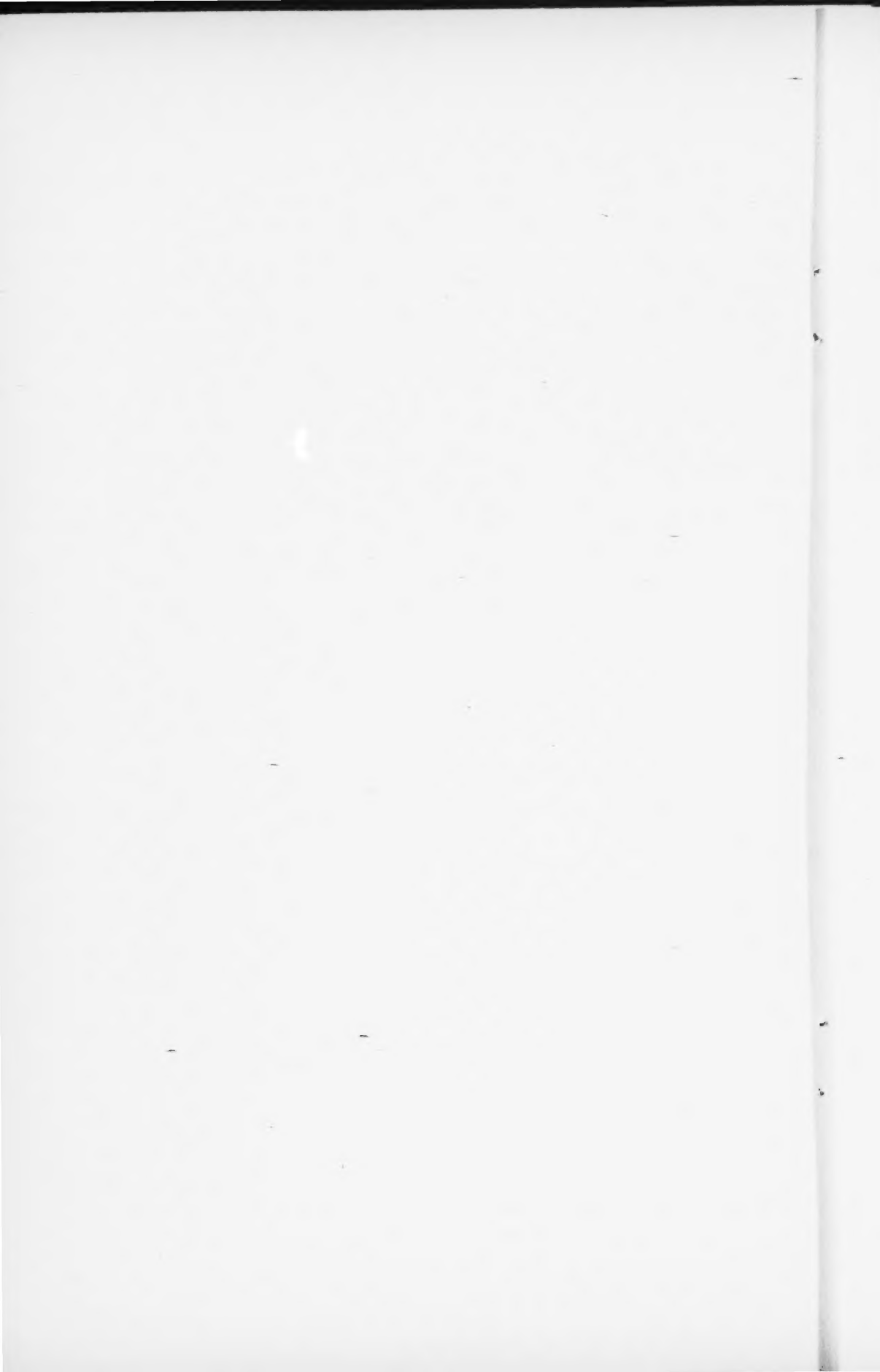


As heretofore stated, following the inquiry by Trooper Manumik on the 24th of May, 1984, and in light of the possibility that it may be Durgan's watch, Tufford removed the watch from being offered for sale to the public and placed it in the business's safe, pending possible legal action. The watch remained in the safe for a period in excess of six months, after which, there having been no action forthcoming, it was removed and offered again for sale and subsequently sold (R.- page 70).

In February of 1985, Durgan filed suit in small claims court seeking the return of what he alleged to be his watch. On the 5th of December, 1985, the District Court ordered Tufford to return the watch(the one sold by Tammy Gitt) to Durgan and awarded Durgan costs and attorney's fees as a result of Durgan's first motion for

summary judgement(R.- pages 26 & 8-10).

On January 20, 1986, Tufford filed a Motion for Relief from Judgement with a Memorandum in Support(R.- pages 31-33) complaining of misconduct by opposing counsel whereby she relied upon his assurances that he would do nothing on the case until she returned from out of state; and that during this absence, he sought and got summary judgement against her. On the 13th of February, 1986, the District Court set aside the aforementioned summary judgement. Such order was conditioned upon Tufford depositing the watch in question with the Clerk of the District Court(R.- page 37). This was an order Tufford was unable to comply with as the Order specifically specified a watch bearing serial #1193 and Tufford never had such a watch in her possession(see R.- pages 89-93). Further, Tufford had held the watch in



question in her safe for a period in excess of six months anticipating possible legal action by Durgan; when none was forthcoming, she removed the watch from her safe and sold it.

Subsequent to the court's order setting aside summary judgement, Durgan filed an Amended Complaint substantially alleging the same facts as the Complaint filed in February of 1985; and seeking return of the watch or in the alternative \$3,850.00. (R.- pages 1-2).

Tufford answered Durgan's amended complaint on the 9th of May, 1986, specifically denying the allegations contained in paragraphs 2 - 9, thus joining the issues for trial(R.- pages 3-6); and in her answer Tufford raised five affirmative defenses - among which were "failure to state a claim upon which relief can be granted", and that the action is barred



by the Doctrines of Unclean Hands, Laches, and Estoppel.

On the 15th of October, 1986, Durgan filed a Motion for Summary Judgement with a Memorandum in Support(R.- pages 47-73) claiming that there were no genuine issues for trial. Prior to Durgan's Motion for Summary Judgement, on the 13th of October, 1986, Durgan filed a Motion for Sanctions with Memorandum in Support(R. - pages 38-43), to which Tufford filed an Opposition with Memorandum in Support, supported by three affidavits(R.- pages 74-81). No dispositive action was taken by the court on Durgan's Motion for Sanctions.

On the 27th of October, 1986, Tufford filed an Opposition to Durgan's Motion for Summary Judgement with a Memorandum in Support, further supported by the Affidavits of LaVone Tufford and Marvin Wright (R.- pages 83-93). Tufford's opposition

clearly showed the existence of genuine issues of material fact for trial. And therewith Tufford filed a timely demand for jury trial(R.- page 82).

Tufford also filed on the 27th of October, 1986, a Motion to Dismiss with Affidavit and Brief in Support showing affirmatively that Durgan's watch is not the watch that Tufford purchased from Tammie Gitt on the 29th of January, 1983 (R.- pages 106-117).

Subsequent to this, Tufford filed a Memorandum to Set Civil Case for Trial (R. - page 130).

However, on the 12th of November, 1986, the District Court granted Durgan's Motion for Summary Judgement, without a hearing, and entered judgement on the 3rd of December, 1986, NUNC PRO TUNC to the 12th of November, 1986(see Appendix, pages 15-17).

The District Court made no findings of fact or conclusions of law in granting summary judgement against Tufford. And there was no disposition made on Durgan's Motion for Sanctions nor did the District Court make any findings pursuant to it.

On the 2nd of December, 1986, Tufford filed her Notice of Appeal; and again on the 5th of December, 1986, she filed an Amended Notice of Appeal(R.- pages 133 & 141). Tufford raised two points on appeal - 1) that the District Court erred in granting summary judgement; and 2) that as a result of granting summary judgement, Tufford was denied her right to a jury trial(R.- page 135).

On appeal to the Superior Court, Tufford conclusively showed the existence of genuine material facts and that she was entitled to a jury trial(see Appellants Opening and Reply Briefs in the record).



The question before the state appellate court involved whether the District Court erred in granting summary judgement with the existence of genuine issues of fact for trial and that as a result of the summary judgement, Tufford was denied her right to a jury trial. However, the appellate court affirmed the judgement of the District Court by erroneously holding that summary judgement was entered in the action as discovery sanction under Rule 37, although there was no such finding made by the District Court(see Appendix, pages 2-14). Summary judgement was specifically entered pursuant to Rule 56(see Appendix, page 17).

Tufford then petitioned the Alaska Supreme Court for a hearing on the 1st of July, 1987, complaining of the aforementioned errors. The Alaska Supreme Court, without opinion and by order dated the



5th of August, 1987, denied Tufford's
Petition for Hearing; said Order being
filed in that court on the 10th of August,
1987. (see Appendix, page 1).

Tufford herein seeks review of the
proceedings below by the nations highest
court.



REASONS FOR GRANTING THE WRIT

This petition raises an important question as to the proper application of the Federal Rules of Civil Procedure as relates to the application of those rules by the courts of the State of Alaska.

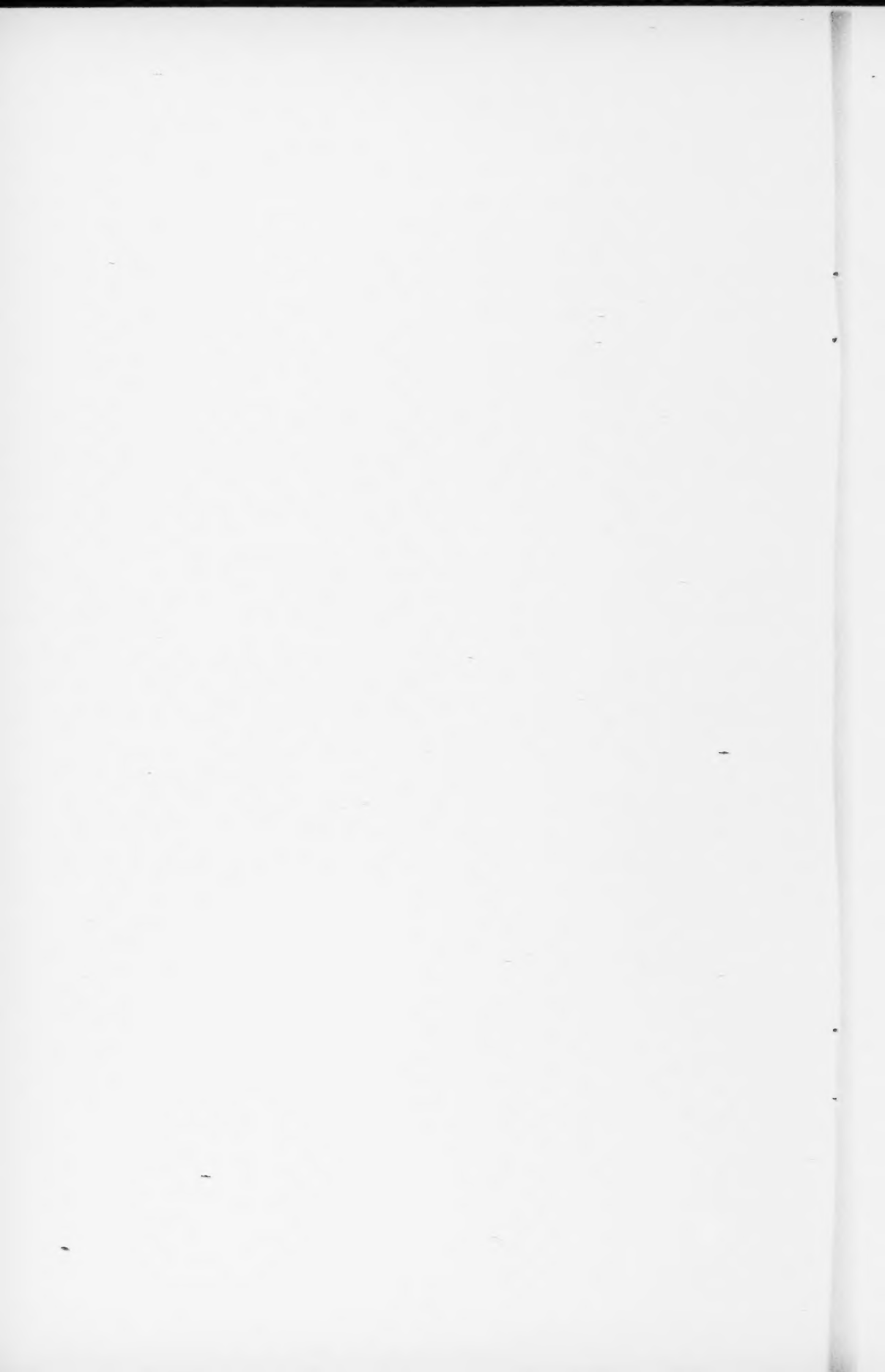
The record and the facts in this case clearly show that the Alaska appellate courts have misapplied Civil Rule 37 in affirming the judgement of the trial court. The record does not support such an affirmation as the trial court made no findings pursuant to Rule 37 and granted summary judgement solely upon and pursuant to Rule 56(see Appendix, pages 15-17). This petitioner had appealed to the Superior Court from the summary judgement of the District Court(Rule 56) on the basis that summary judgement was not the appropriate remedy in this case as there existed by way of the pleadings



and the affidavits, genuine issues of material fact for trial.

However, the Superior Court refused to address the existence of these facts and chose instead to depart on its own theory that summary judgement was granted as a discovery sanction, citing to Hawes Firearms Company v. Edwards, 634 P.2d 377(Ak. 1981), in which a trial court sanctioned a litigant after finding willfulness of the party in impeding discovery. The trial court in the case at bar made no findings whatsoever pursuant to Civil Rule 37 and judgement was given solely on the Plaintiff's motion for summary judgement.

This court has held that it is sufficient to grant certiorari in a case to determine the proper application of the Federal Rules of Civil Procedure(i.e. Societe Internationale v. Rogers, 357



U.S. 197(1958):

"Because this decision raised important questions as to the proper application of the Federal Rules of Civil Procedure, we granted certiorari. 355 U.S. 812."

supra, at 203

and,

"we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pre-trial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner."

supra, at 212

In the instant case, Respondent filed a Motion for Sanctions(R.- pages 38-43), which this Petitioner opposed(R.- pages 74-81) supported by three affidavits. The trial court made no disposition on this motion for sanctions nor were any findings made by the court pursuant to it. Summary judgement was granted solely on the Respondent's Motion for Summary



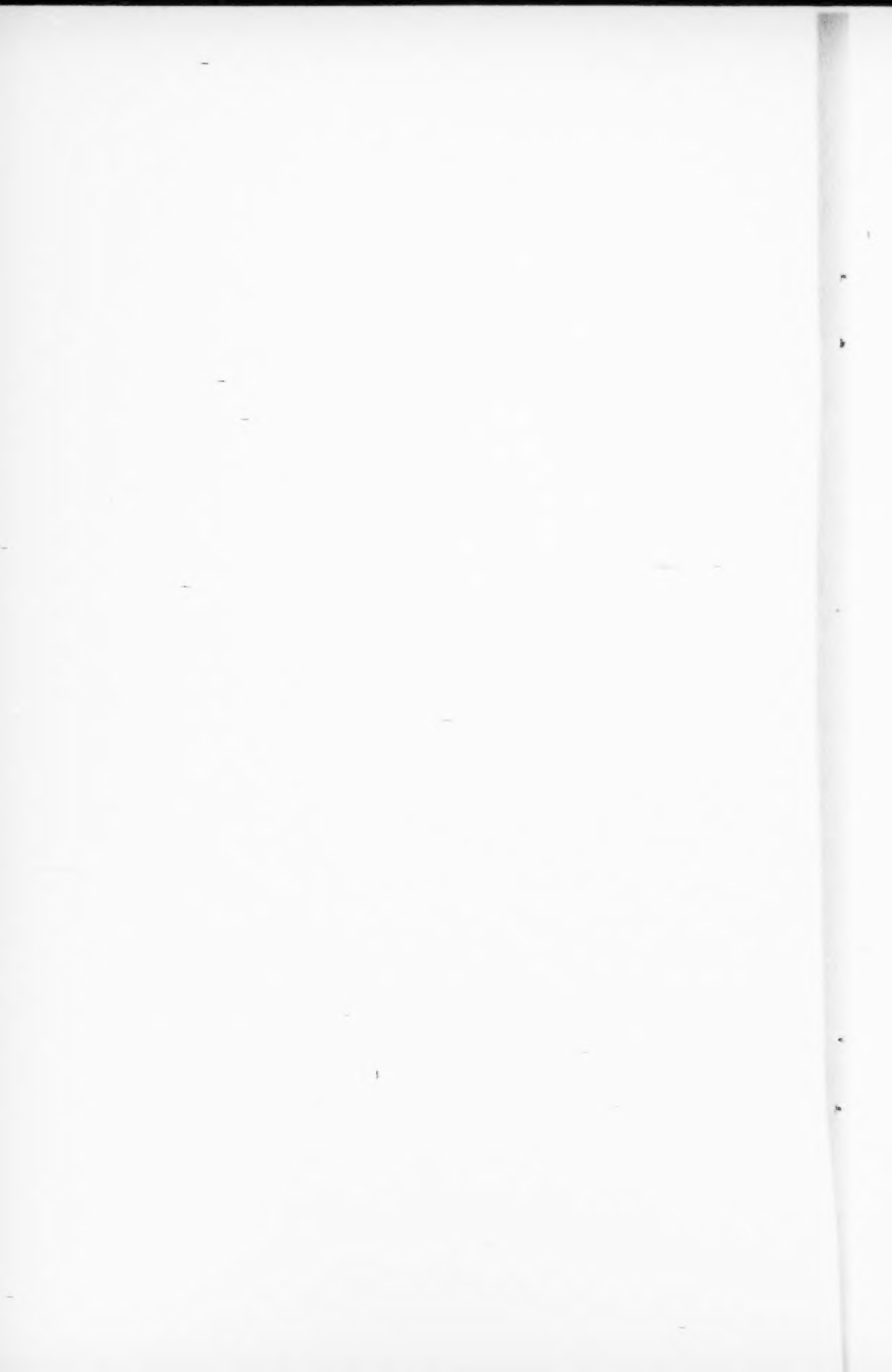
Judgement which this Petitioner had opposed supported with two affidavits (R.- pages 83-93) showing the existence of genuine issues of material fact for trial. The trial court granted the Respondent's Motion for Summary Judgement without according the party's a hearing.

It is well settled that:

"Summary judgement is proper only where there is no genuine issue of material fact and the moving party is entitled to judgement as a matter of law. All evidence is to be viewed in a light most favorable to the non-moving party."

Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675,677 (9th Cir. 1984)

The trial court's order granting summary judgement is totalling void of any findings of fact or conclusions of law(see Appendix, page 17), and no subsequent findings or conclusions were filed. This leaves this petitioner without a hint as to the basis for the



finding relevant to summary judgement. Petitioner's Opposition and Affidavits stand unrefuted and as such are prima facie evidence of genuine issues of material fact for trial. Petitioner here contends that such proceedings do not accord her due process of law:

"Law in its regular course of administration through courts of justice is due process."

Leeper v. Texas, 139 U.S. 462(1891)

And the Alaska Supreme Court had this to say regarding 'due process':

"When principles of due process attach, there is a certain level of procedural fairness that must be accorded to an affected party."

Nichols v. Eckert, 504 P.2d 1359 (Ak. 1973)

This Petitioner believes that the "certain level of procedural fairness" that must be accorded is 'notice and an opportunity to be heard'!! The procedure in the Alaska courts in regard to the

case at bar has not met this threshold requirement.

For the Alaska courts to sustain a summary judgement on their own presumptions which find no support in the record of the trial court's findings; or in the absence of any findings by the trial court, has caused this Petitioner a deprivation of her right to due process of law as guaranteed by both federal and state constitutions.

CONCLUSION

WHEREFORE, for the aforestated facts and reasons, Petitioner respectfully requests this court grant her Petition for Writ of Certiorari.



Respectfully Submitted,

LaVone Tufford
LaVONE TUFFORD - Petitioner
In Propria Persona

On this 26TH day of OCTOBER, 1987,
before me, a NOTARY PUBLIC in and for the
State of Alaska, duly commissioned and
sworn, personally appeared LaVone Tufford,
known to me to be the individual who executed the within and foregoing instrument,
and acknowledged the said instrument to be
her free and voluntary act and deed, for
the uses and purposes herein mentioned.

GIVEN UNDER MY HAND AND SEAL this 26TH
day of OCTOBER, 1987.

Wm. L. Rawlin
NOTARY PUBLIC in and for the
State of Alaska

My Commission expires: AUG. 3, 1990



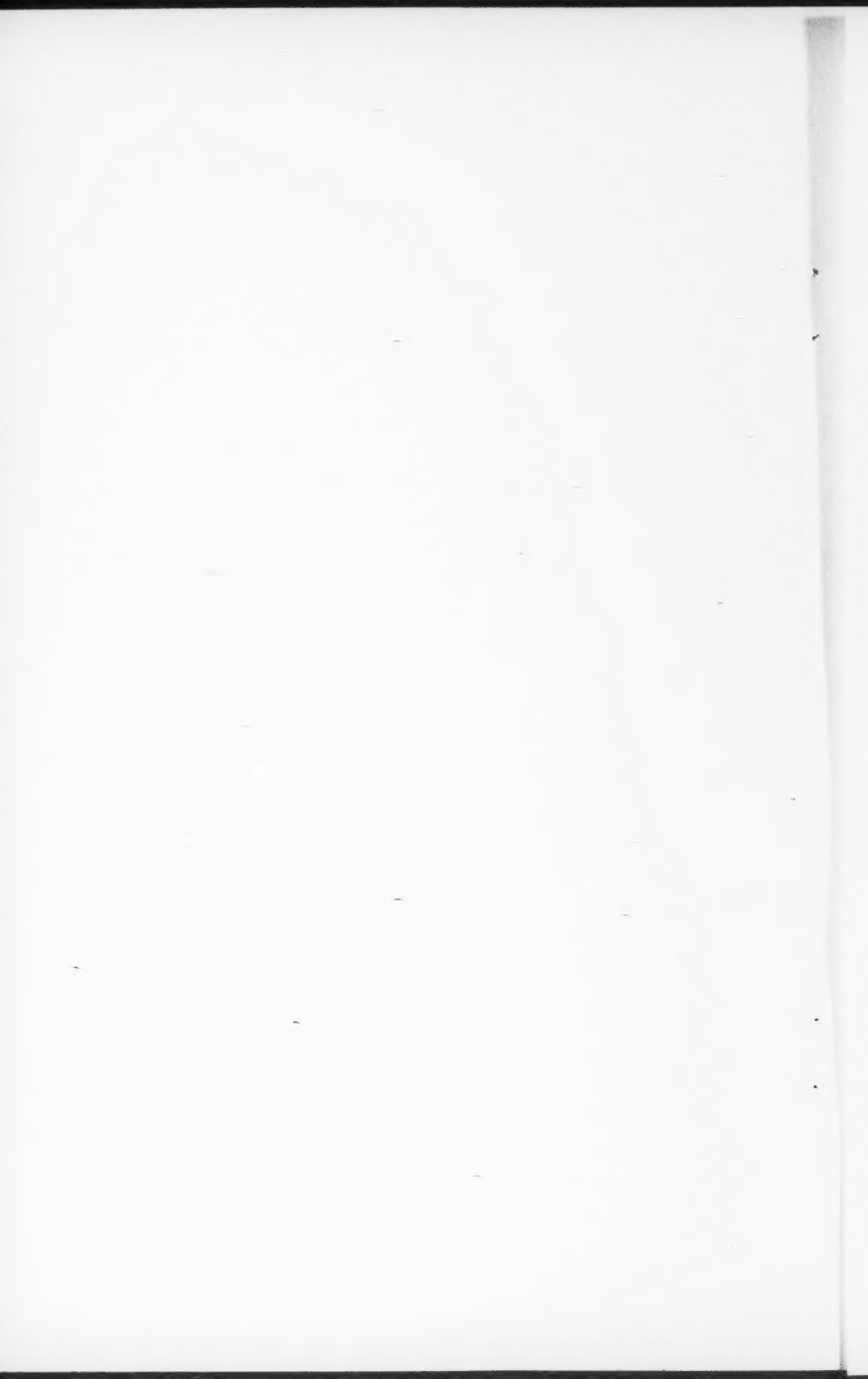


A P P E N D I X



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IN THE SUPREME COURT
OF THE
STATE OF ALASKA

LaVONE TUFFORD d/b/a)	
B & L PAWNSHOP,)	
) Supreme Court
Petitioner,)	No. S-2263
)
vs.)	
) <u>ORDER</u>
BURTON D. DURGAN,)	
)
Respondent,)	
_____)	

Superior Ct.#4FA-85-1444 Civ.

FILED AUG. 10, 1987

Before: Burke, Matthews, Compton, and
Moore, Justices.(Rabinowitz,
Chief Justice, not participating).

On consideration of the petition for
hearing, filed on July 1, 1987.

IT IS ORDERED:

The petition for hearing is denied.

Entered by direction of the court at
Anchorage, Alaska on August 5, 1987.

CLERK OF THE SUPREME COURT

/s/ CHARLENE A. DOLPHIN
Acting Clerk of Court



IN THE SUPERIOR COURT FOR THE STATE
OF ALASKA, FOURTH JUDICIAL DISTRICT

LAVONE TUFFORD d/b/a)	
B & L PAWNSHOP,)	
)	
- Appellant,)	Case #
)	4FA-85-1444 Civ.
vs.)	
)	<u>OPINION</u>
BURTON D. DURGAN,)	
)	
Appellee,)	<u>FILED JUNE 16, 1987</u>
)	

This case comes before the court on appeal from an order of the district court granting summary judgement in favor of the plaintiff and against the defendant. The following facts are relevant.

In 1973, Burton Durgan(plaintiff/appellee) purchased a Wittnauer wrist watch. He had several gold nuggets affixed to the band and his initials engraved somewhere on the watch.¹ Durgan stored the watch in his residence in late 1982

1. It is unclear whether the initials were on the back of the watch case or the band.

when he went to the North Slope to work. He apparently had an informal agreement with a neighbor, George Thiele, Jr., that Thiele could enter Durgan's residence to remove certain items and pawn them in Durgan's absence. Durgan at no time authorized Thiele to pawn the watch.

On May 23, 1984, Durgan was in B & L Pawnshop, which was owned by the Lavone Tufford(defendant/appellant). Durgan saw a watch and determined that it was his. He immediately reported the theft of his watch to the Alaska State Troopers.

The next day Durgan returned to the B & L Pawnshop with Trooper Manumik who inspected the watch and found it to be as Durgan had described it. The watch was placed in B & L Pawn Shop's safe.

On May 30, 1984, troopers returned to B & L Pawn Shop to retrieve the watch but Tufford would not allowed the watch

to be removed from the shop.

The troopers' investigation revealed that another neighbor of Durgan's, Tammy Gitt, had taken the watch to B & L Pawn Shop on January 29, 1983. At deposition, Gitt stated that she received the watch from Thiele but did not know how Thiele had acquired the watch. Gitt received \$150 for Thiele from the pawn shop. Thiele is no longer available as a witness.

On June 4, 1984, Trooper MacDonald contacted Hoitt's Jewelry, whose records showed that Durgan's watch had been purchased and nuggeted on June 15, 1973. MacDonald reported the serial number on the watch as number 1193.²

Also on June 4, 1984, MacDonald went to B & L Pawn Shop where he inspected pawn ticket number 83-403 issued to

2. "1193" refers to Hoitt's ledger record. The actual serial numbers are inside the watch case.



Tammy L. Gitt. MacDonald advised Tufford at that time that the watch in question had been stolen.

On two occasions, Durgan had Tammy Gitt return to B & L Pawn Shop to repurchase the watch. On the first attempt, the price was \$1,300. On the second attempt, the price was \$2,000. Gitt was unwilling to pay either amount.

In February 1985, Durgan filed suit in small claims court. On December 5, 1985, Judge Crutchfield ordered Tufford to convey the watch to Durgan. On January 6, 1986, Durgan's attorney demanded delivery of the watch. The attorney was advised by Tufford's employees that the watch was in B & L Pawn Shop's safe, that Tufford was out of state for the winter and that the employees did not have the combination to the safe.

On January 16, 1986, Judge Crutchfield



issued a Writ of Replevin. This writ was served on B & L Pawn Shop by Officer Kendrick of the Fairbanks Police Department. When Kendrick appeared at B & L Pawn Shop, an employee stated that she could not open the safe and that Tufford was out of town. Upon entering the back room, Kendrick observed Tufford closing the safe. Tufford re-opened the safe for Kendrick whose did not uncover the watch.

On January 20, 1986, Tufford filed a motion for relief from judgement in response to the court's order granting Durgan's first motion for summary judgement. Durgan did not oppose Tufford's motion and proposed that the court set aside the Writ of Replevin at such time as Tufford deposited the watch with the clerk of the court. On February 13, 1986, Judge Zimmerman ordered that upon such deposit of the watch, any judgement and all writs



be set aside.

Instead of depositing the watch with the clerk of the court, Tufford's answer's to interrogatories dated August 19, 1986, revealed that Tufford sold the watch:

The watch was held in accord with State law and City of Fairbanks regulations, after which it was offered for sale to the general public. When there was a police inquiry regarding said watch, it was taken off the market and held in safekeeping pending possible legal action regarding said watch for a period of over six months, said watch was again offered for sale to the general public after some repair and cleaning was done by a local jewelry firm. Then said watch was subsequently sold.

The last time this defendant saw said watch was when it was being sold.

There are no documents available in defendant's office to show what happened to the watch.

On September 18, 1986, Tufford failed to appear for deposition. On October 13, 1986, Durgan moved the court for sanctions under rule 37(d). Two days later Durgan moved for summary judgement. Over Tufford's



opposition to both motions, the district court entered summary judgement in favor of Durgan and against Tufford.

Tufford raises two points on appeal: (1) that the district court erred in granting summary judgement, and (2) that the grant of summary judgement was a denial of the right to a jury trial under Rule 38.³

Tufford claims that summary judgement should have been denied because a genuine and material issue of fact exists with respect to the ownership of the watch. Tufford maintains that the watch she purchased from Gitt and later sold was not Durgan's stolen watch.

Ordinarily, summary judgement is precluded when the non-moving party establishes the existence of a genuine and

3. This issue need not be addressed. Naturally, the parties are not entitled to a jury trial where the court grants summary judgement.



material issue of fact. Rule 56. However, the factual issue can be resolved by the court under certain circumstances. See Rule 36; e.g. Riley v. Northern Commercial Co., 648 P.2d 961(Alaska 1982)(summary judgement based on deemed admissions).

In the instant case, the district court granted Durgan's motion for summary judgement on the basis of Tufford's refusal to comply with the court's orders to deliver the watch to the proper authorities and appear for deposition based on Durgan's motion for Rule 37 sanctions. Tufford opposed the motion on the ground that she was out of state at the time, and she did not receive the notice until she returned one month after the date scheduled for the deposition. Tufford states in affidavit:

That due to personal business in and out of Fairbanks, I had taken a leave from work during the month of September.



Tufford returned to Fairbanks on October 13, 1986. Id. Tufford also states that she should be excused because Durgan failed to subpoena her as required by Rule 45.

Tufford's arguments lack merit. Since Tufford is a party, a subpoena to compel her attendance is not necessary. Rule 37(d). Thus, Tufford was served with proper notice. A party to litigation cannot avoid the process of ongoing litigation by mere absence from the last known address for service. Tufford should have made provisions for keeping current with the progress of the case, if for no other reason than to avoid the confusion and expense which both parties experienced when Tufford missed the scheduled hearing on Durgan's first motion for summary judgement in December 1985.

The issue then, is whether the grant

of summary judgement as a sanction for violation of court orders and discovery rules was an abuse of discretion. Hawes Firearms Co. v. Edwards, 634 P.2d 377, 378 (Alaska 1981).

Before sanctions may be imposed, the trial court must find that the non-compliance is willful. Id. The finding may be implicit. Id. There is ample support in the record for such a finding in the instant case. The record reveals a pattern of refusal to comply with court orders on the part of Tufford. In these circumstances, the trial court did not abuse its discretion in imposing sanctions on Tufford.

The test for the validity of a discovery sanction that orders facts or issues to be taken as established under Rule 37 (b)(2) is whether these issues are "elements of the dispute that cannot be det-

etermined on the merits without disclosure of the evidence the Court has ordered the party to produce." Bachner v. Pearson, 479 P.2d 319, 324 (Alaska 1970)(citations omitted). The circumstances of the instant case present the precise situation contemplated by the Bachner court. Only discovery of the ownership of the watch produced through the deposition of Tufford could resolve the issue which she seeks to determine at trial. Accordingly, the court's order establishing the ownership of the watch was appropriate.

The trial court's grant of summary judgment based on the facts established by the trial court is affirmed as Durgan was entitled to recover as a matter of law. As stated in 63A Am Jur 2d, Property, section 44, Theft of Personal Property Affecting Owner's Title and Rights:



Theft of goods or chattels does not divest one who owns, or has title to, such property from his ownership of the property; the owner may follow and reclaim the stolen goods wherever he may find them, even if such goods have been changed or improved. If possession of the stolen goods by an innocent subsequent purchaser may be deemed lawful, it is rendered unlawful by his refusal to honor demand by the true owner for their possession. Even though such a purchaser may be treated as having title and the right to their possession as against everyone but the rightful owner, the sale by the thief or by any person claiming under the thief does not vest any title in the purchaser as against the owner, though the sale is made in the ordinary course of trade and the purchaser acted in good faith.

(Emphasis added).

As against Tufford, Durgan had title to the watch. Upon Durgan's claim, Tufford was not authorized to keep or dispose of it. Tufford's sale of the watch to an unknown person was in violation of Durgan's ownership rights and subjects Tufford to liability for damages.

The trial court implicitly found that Tufford willfully failed to comply



with court orders and discovery procedures. Under Rule 37, the trial court has broad discretion to choose an appropriate sanction. In light of the record, the court's decision to grant summary judgement in favor of Durgan is not an abuse of discretion, and Durgan is entitled to judgement as a matter of law. The trial court's order is AFFIRMED.

DATED at Fairbanks, Alaska this 15
day of June 1987.

/s/ JAMES R. BLAIR
Superior Court Judge



IN THE DISTRICT COURT FOR THE STATE
OF ALASKA, FOURTH JUDICIAL DISTRICT

BURTON D. DURGAN,)
)
 Plaintiff,)
)
vs.)
)
LaVONE TUFFORD dba)
B & L PAWNSHOP,)
)
 Defendant,)
)

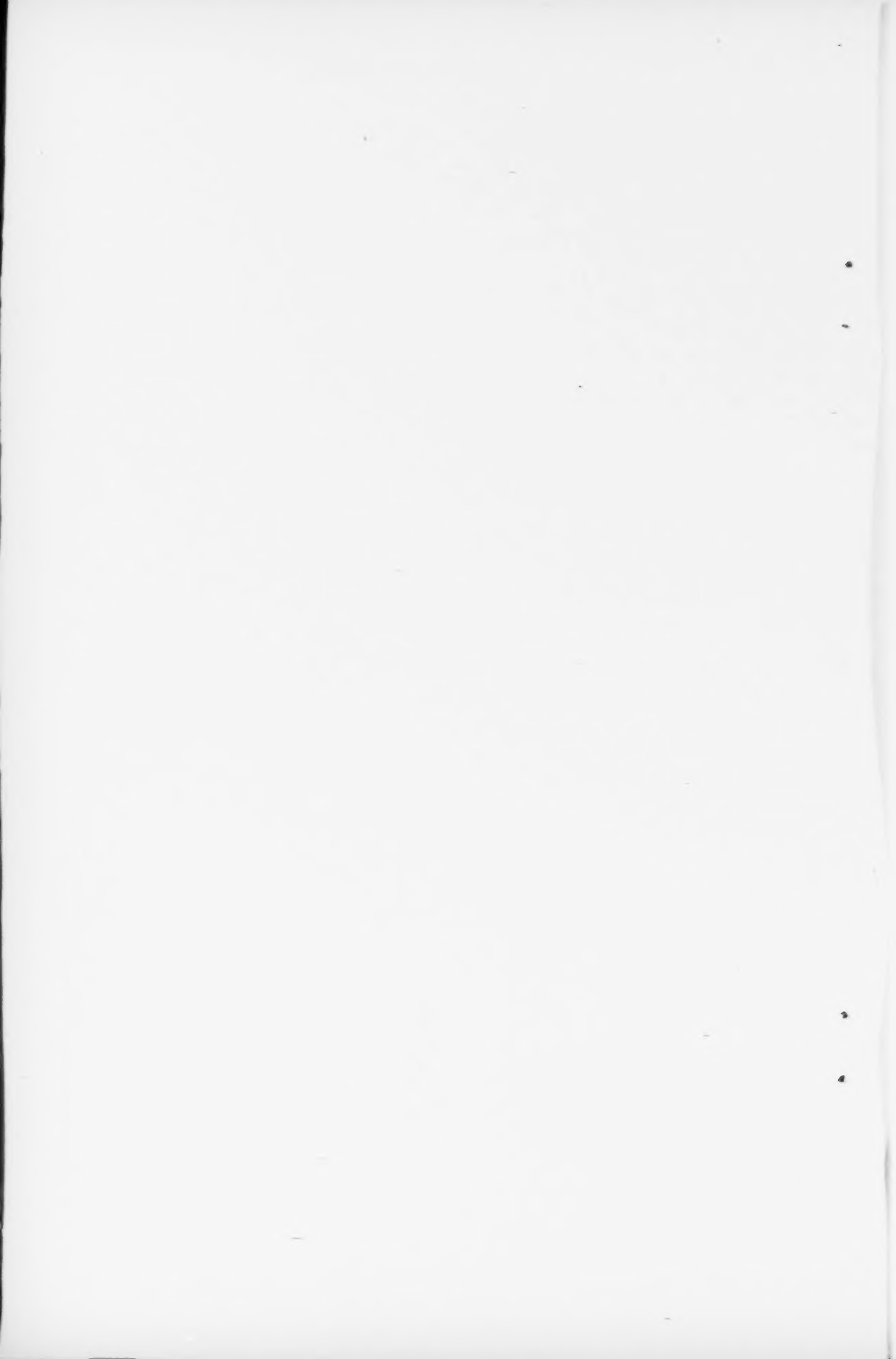
FILED Dec. 3, 1986

Case #4FA-85-1444 Civ.

JUDGEMENT

Plaintiff's Motion for Summary Judgement for the relief demanded in the complaint having been granted by this Court on November 12, 1986, it is

ORDERED, ADJUDGED AND DECREED that judgement be entered in favor of Plaintiff and against Defendant in the principal amount of \$3,850.00, plus prejudgement interest thereon at the rate of 10.5% per annum from March 24, 1984, \$1,066.56, Rule 82 attorney fees in the amount of



\$1,100.00, attorney fees in the amount of \$250.00, pursuant to an Order entered on November 3, 1986, by Judge Zimmerman, for a total judgement of \$6,266.56, plus interest on the judgement at the rate of 10.5% per annum until paid in full.

DATED at Fairbanks, Alaska this 2nd day of December, 1986. NUNC PRO TUNC Nov. 12, 1986.

/s/ Christopher E. Zimmerman
DISTRICT COURT JUDGE



BURTON D. DURGAN,)
)
Plaintiff,)
)
vs.)
)
LaVONE TUFFORD cba)
B & L PAWNSHOP,)
) FILED Nov. 12, 1986
Defendant,)
)

10 12 13 14 15

IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgement is GRANTED.

/s/ Christopher E. Zimmerman
DISTRICT COURT JUDGE